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EXTRA-TERRITORIAL EFFECT OF DECREE FOR DIVORCE ON CONSTRUCTIVE SERVICE.

The sole purpose of this paper is to discuss the validity of a decree of divorce rendered by a foreign court, in so far as the validity is dependent upon the jurisdiction which the court acquires over the defendant, when such jurisdiction was acquired in the manner provided by the law of the sovereignty under which a divorce was granted. In other words, when a court of competent jurisdiction in which a suit for divorce is instituted, acquires jurisdiction over the defendant in the manner prescribed by the local law, has it acquired such jurisdiction over the defendant as entitles its decree of divorce to extra-territorial recognition, assuming that the court has jurisdiction of the subject-matter of the divorce, that it has jurisdiction to grant a divorce at the suit of the plaintiff, that the divorce is granted on a ground entitling it to be recognized extra-territorially, and that the proceedings are regular.

As to some phases of this question there can be no serious difference of opinion. Thus, it is not questioned that a foreign divorce is valid if both of the parties were domiciled within the territorial jurisdiction of the court, whether the service or process upon the defendant was actual or constructive. Nor is it questioned that a foreign divorce is valid if it was granted against a nonresident defendant who was personally served with process within the territorial jurisdiction of the court or who entered an appearance in the suit. There is no doubt either that a foreign divorce is invalid if neither of the parties was domiciled within the jurisdiction of the court, and the decree was based upon constructive service only. But the question as to the extra-territorial effect of a divorce granted in favor of a plaintiff domiciled within the court's jurisdiction and against a nonresident defendant has given rise to such a decided difference of opinion

that the authorities are in hopeless and irreconcilable conflict, as will be shown.

The cases in the state courts, with a few exceptions hereinafter noted, overwhelmingly preponderate in holding that wherever plaintiff has acquired a *bona fide* domicile in a particular state he may lawfully appeal to the courts of that state for a dissolution of the marriage tie, for the causes permitted by its statute, and may call in the nonresident defendant by publication.

In many of them the full faith and credit clause of the Constitution does not seem to have been called to the attention of the court, and the case was disposed of upon the principles of comity, which gave to the court a certain latitude of discretion, whereas, under the full faith and credit clause, the consideration given to a decree in the state where it is rendered is obligatory in every other state.

New York: It is not questioned that the courts of New York are vested by statute with authority to render decrees of divorce where the plaintiff is domiciled within that state, which shall be operative in that state even although the defendant is a nonresident and is proceeded against by constructive service. Borden *v.* Fitch,[1] and Bradshaw *v.* Heath,[2] were decided respectively in the years 1818 and 1835. These cases as declared by the Court of Appeals of New York in People *v.* Baker,[3] upheld the principle that a court of another state could not dissolve the matrimonial relation of a citizen of New York, domiciled in New York, unless he was actually served with notice within the other state or voluntarily appeared in the cause. The doctrine that an action of divorce is one *inter partes* was thus clearly reiterated by Andrews, J., in Jones *v.* Jones.[4] "The contract of marriage can not be annulled by judicial sanction any more than any other contract *inter partes,* without jurisdiction of the person of the defendant. The marriage relation is not a *res* within the state of a party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a

1. 15 Johns, 121.
2. 13 Wend. 407.
3. 76 N. Y. 82.
4. 108 N. Y. 415, 424; 15 N. E. Rep. 707.

citizen of another jurisdiction, by a substituted service or actual notice of the proceedings given without the jurisdiction of the court where the proceedings is pending." That the principle is still in force by the New York court is shown by recent cases, viz.,[5] and it is indubitable that under this doctrine the courts of New York have invariably refused as they have done in the former cases, to treat a divorce granted in another state under the circumstances stated, as entitled to be enforced in New York by virtue of the full faith and credit clause of the Constitution of the United States; and indeed have they refused generally to give effect to such decrees even by state comity:

Massachusetts: Barber *v.* Root,[6] Hanover *v.* Turner,[7] Hartu *v.* Hartu,[8] were decided respectively in 1813, 1817 and 1833. In 1835 the legislature of Massachusetts incorporated into the statutes of that state, following a section forbidding the recognition of divorce obtained in another jurisdiction in fraud of the laws of Massachusetts, a provision reading as follows: A divorce decreed in another state or country according to the laws of the place by a court having jurisdiction of the cause and of both of the parties, shall be valid and effectual in this state. And it may be observed that this section, when submitted to the legislature by the commissioners for revising the Massachusetts statute, was accompanied by the following comment: "This is founded on the rule established by the comity of all civilized nations, and is proposed merely that no doubt should arise on a question so interesting and important as this may sometimes be." In Lyon *v.* Lyon (1854),[9] the question was as to the validity in Massachusetts of a divorce decreed in Rhode Island in favor of one party to a marriage against the other who was domiciled in Massachusetts. The court refused to give extra-territorial effect to the Rhode Island decree. In the opinion by Chief Justice Shaw, it was declared that the three cases which I have previously referred to sustain the doctrine, based upon

5. Lynde *v.* Lynde, 162 N. Y. 405, 56 N. E. Rep. 979; Winston *v.* Winston, 165 N. Y. 553, 59 N. E. Rep. 273.

6. 10 Mass. 260.

7. 14 Mass. 227.

8. 14 Pick, 181.

9. 2 Gray (Mass.) 367.

general principles of law, that a decree of divorce rendered in another state without jurisdiction of both of the parties possesses no extra-territorial force. In Hood *v.* Hood (1865),[10] the controversy was this: The parties were married in Massachusetts and after a residence in that state moved together to Illinois. The wife left the domicile of the husband in Illinois and returned to Massachusetts. Thereafter in Illinois, the husband sued the wife for divorce on the ground of her desertion, obtained a decree and married again. The case decided in Massachusetts was a suit brought in that state by the former wife against the former husband for divorce on the ground of adultery alleged to have been committed by him with the person whom he had married after the decree of divorce in Illinois had been rendered. The Illinois decree was pleaded in bar. The question whether the Illinois decree should be given extra-territorial effect in Massachusetts depended upon the rule announced in the previous cases, upon whether both the husband and the wife were parties to the Illinois decree. For the purpose of the determination of this jurisdictional question it was held that it was necessary to ascertain whether the wife was justified, by the fault of the husband in leaving him in Illinois and going back to Massachusetts. It was decided that if she was justified in leaving the husband, her legal domicile was in Massachusetts, and she was not a party to the Illinois decree, and that if she was not justified in living separate from the husband, the ordinary rule being that the domicile of the husband was the domicile of the wife, she was domiciled in Illinois, and must be considered as subject to the jurisdiction of the Illinois court. Applying this legal principle to the facts in the case before it the court held that as there was no evidence showing that the wife had justifiable cause for leaving her husband, the legal presumption that the domicile of the husband was the domicile of the wife prevailed, and that the Illinois decree was entitled to extra-territorial effect in Massachusetts, and bound the wife, because rendered by a court having jurisdiction over both parties. In Shaw *v.* Shaw (1867),[11] the facts were these: The parties were married in Massachusetts, lived there, and left together for

10. 11 Allen, 196.
11. 98 Mass. 158.

the purpose of settling in Colorado. On the journey, at Philadelphia, the wife was forced by extreme cruelty of the husband to leave him. She returned to Massachusetts while he went on to Colorado. Subsequently the wife sued in Massachusetts for a divorce from bed and board. The husband was brought in by substituted service and defaulted. The court in the most explicit terms recognized that a decree of divorce to have extra-territorial effect must be rendered with jurisdiction over both parties. It said: "For the purpose of divorce the general rule of jurisprudence is that a divorce granted in the place of the domicile of both parties, and there valid, is good everywhere." The court came then to consider whether it could render a decree in Massachusetts in favor of the wife. This depended upon a statute of Massachusetts which authorized the granting of a divorce where the cause for divorce occurred while the parties had lived together as husband and wife in Massachusetts, and one of them lived in that state when the cause of divorce occurred. It was held that at the time of the commission of the cruelty in Philadelphia charged against the husband, the domicile of the parties in Massachusetts had not been lost and as by that cruelty the wife was justified in returning to Massachusetts, and the subsequent acquisition of a new domicile by the husband in Colorado did not make such domicile that of the wife, there was justification and the divorce was granted.

Hood *v.* Hood (1872),[12] was an attempt again to assail the validity of the Illinois decree of divorce which had been adjudged valid in 11 Allen, 196, because it was found that both husband and wife had been parties to the decree. The Massachusetts decree so holding was therefore held to be *res judicata* as to all persons and to foreclose further inquiry into the validity of the Illinois decree of divorce. In Burlen *v.* Shannon (1874),[13] the facts leading up to the controversy and those involved therein were as follows: Shannon and his wife lived together in Massachusetts, where she left him. Without stopping to refer to prior legal controversies which arose between Shannon and his wife and between Shannon and Mrs. Burlen, which are irrelevant to be considered, it sufficeth to say that

12. 110 Mass. 463.
13. 115 Mass. 438.

Mrs. Burlen sued Shannon in 1850 to hold him liable for necessary supplies furnished to the wife. Shannon resisted on the ground that the wife had been living apart from him without his fault or consent, and this defense was maintained.[14] Shannon went to Indiana in 1855 and took up his domicile in that state, where in 1856 he obtained a decree of divorce upon constructive service. Subsequently in Massachusetts Mrs. Burlen again sued Shannon for necessaries furnished to the wife between February 22, 1860, and February 7, 1866. He pleaded the Indiana divorce and the validity of the divorce was assailed by Mrs. Burlen on the ground that the wife had not been a party to the divorce cause, and therefore the Indiana decree had not extra-territorial effect in Massachusetts. The court in effect after reiterating the previous rulings and referring to the statute concerning the necessity for the presence of both parties within the jurisdiction where a decree for divorce of another state was sought to be given effect in Massachusetts; also reiterating the previous ruling that the wife might acquire a separate domicile from the husband if she lived separate from him for justifiable cause. The court was brought therefor, to consider whether, Mr. and Mrs. Shannon were both parties to the Indiana decree on the ground that the domicile of the husband was the domicile of the wife. The solution of this question depended, as it had depended in Hood *v.* Hood,[15] upon whether the wife was absent from her husband because of his fault. On this subject it was decided that the previous judgment in favor of Shannon and against Mrs. Burlen in the prior action between the parties had conclusively determined between them that Mrs. Shannon was absent from her husband without his fault or consent, therefore, under the legal presumption that the domicile of the husband was the domicile of the wife, both, the husband and wife were parties to the Indiana decree and it was not subject to attack in Massachusetts. To cite, as has sometimes been done, the language of the opinion of the court referring to the previous judgments in the earlier action between Mrs. Burlen and Shannon as if that language referred to the Indiana decree of divorce, leading to the implication that that

14. 3 Gray, 387.
15. 11 Allen, 196.

decree was held to be conclusive, even if only one of the parties was domiciled in the state where the decree was rendered, not only is a plain misconception, but is equivalent to asserting that the Massachusetts court had overruled its previous decisions and disregarded the spirit if not the letter of the state statute without the slightest intimation to that effect.

In Cummington *v.* Belcherton,[16] the facts were these: The parties to a marriage celebrated in Massachusetts, lived together in that State until the wife was taken to a Massachusetts asylum for the insane, when the husband abandoned her, acquired a domicile in New York, there brought suit on the ground of fraud for the annulment of the marriage and obtained a decree. The wife was only constructively served with process, did not appear and was not represented. The Massachusetts court held upon the authority of the Blackington case,[17] that if a decree was to be recognized in Massachusetts it could only be on grounds of comity. And in concluding its opinion the court said: "Upon the ground, then, that the decree of the New York court attempts to annul a marriage in Massachusetts between Massachusetts citizens, and thus affect the legal status of the woman, who has remained domiciled in Massachusetts, and has never been within the jurisdiction of the New York court, and deprived her of the right acquired by her marriage, and especially because it declares the marriage void for a reason on account of which by the Massachusetts law it cannot be avoided; we are of the opinion that it should not be enforced here and that no principle of interstate comity requires that we should give it effect." True it is, the court reserved the question as to what effect might be given to a divorce if granted by a New York court under circumstances such as existed in that case. But, as a suit for a declaration of nullity and one for divorce are both but modes for determining judicially the status of the parties, it must in reason follow if jurisdiction over both is a prerequisite in one class, it is of necessity also essential in the other.

Maine: In Harding *v.* Alden (1832),[18] the facts were these:

16. 149 Mass. 223, 21 N. E. Rep. 435.
17. 141 Mass. 432, 5 N. E. Rep. 830.
18. 9 Me. 140.

While living together in Maine, a husband deserted his wife. He went to North Carolina, where he pretended to marry, and lived there with another woman. In the meantime the wife whom he had deserted took up her residence in Rhode Island, where she sued for a divorce on the ground of adultery committed by the husband in North Carolina. The husband, who was notified in North Carolina, did not appear in the Rhode Island divorce cause. A decree of divorce was granted and the wife then remarried. The first husband during the coverture, owned and alienated real estate in Maine, and a statute of that State provided that where a divorce was decreed for adultery by the husband, dower might be assigned to the divorced wife in the same manner as if the husband were dead. The divorced wife brought an action of dower in a court in Maine. The Rhode Island decree was held to possess validity in Maine and the statute relating to dower was decided not to be limited to divorces decreed within the State of Maine. Considering the opinion in its entirety it is plain that the Rhode Island divorce was given recognition from consideration of right and justice and upon the ground of state comity. Thus, the court called attention to the fact that adultery was a cause for divorce in both states and that divorces were granted in Maine against nonresidents, and it was observed that "there would be great inconvenience in holding that divorces ought not to be recognized in other states when granted in the state where the *injured party* resided against one who had established his domicile in another state and there committed adultery.

True it is, in the course of the opinion reasoning was employed tending to show that the Rhode Island court might be considered to have had jurisdiction in the complete sense, and it was intimated that the full faith and credit clause might have application, but the operation of the Rhode Island decree in Maine was by the decree of the Maine court expressly limited to the dissolution of the marriage. How far removed this was from giving to the Rhode Island decree the benefit of the full faith and credit clause will be made clear by what follows: Harding *v.* Alden was decided at the July term, 1832. Less than two years afterwards, on March 5, 1834, Public Laws, 1834, c. 116, p. 119, the statute of Maine regulating divorces

was supplemented by various provisions, one such being the following: "Section 2. Be it further enacted, that in all cases where one party has been or shall be divorced from the bonds of matrimony the court granting the same upon application therefor shall grant to the other party a like divorce, on such terms and conditions as the said court in the exercise of a sound discretion may judge reasonable." This provision was carried into the revised statute, 1840, c. 89, § 2, and, although repealed in 1850, in a general revision of the divorce laws, it was held that the legislature did not intend to deprive the courts of Maine of the power to entertain a suit for divorce brought by a person from whom the other party to a marriage had already been divorced, and that the courts of Maine still possessed power to exercise jurisdiction over such suits.[19] In the case cited, although a husband had already obtained an absolute divorce a like divorce was granted to the wife and the court allowed to her certain articles of personal property and the sum of $500. In overruling exceptions to the decree the appellate court adopted a theory that the second decree in no wise impugned the first and was important only as enabling "the court to make such ancillary decrees concerning the property as justice and humanity may require. In the course of the opinion the court said:

"There is no class of cases in which the court is so liable to be imposed upon, and a decision obtained contrary to the truth as *ex parte* divorce suits. The notice is often imperfect so that the confession of guilt implied in the default is deceptive. And it is well known that witnesses testifying in the presence of one of the parties and in the absence of the other, will so alter and magnify the faults of the absent, and suppress everything that makes against the party present, that it is impossible to tell where the truth and real merits of the controversy are. When both parties are present each is sure to put the other in the wrong; and *a fortiori* is this true, when one of the parties is permitted to testify in the absence of the other as is now the case in divorce suits. We repeat, therefore, that there is no class of cases in which the court is so liable to be imposed upon; and it seems to us of the utmost importance that the court should be possessed of the power in some form to revise their decisions

19. Stilphen *v.* Stilphen, 58 Me. 508.

in this class of cases; otherwise the grossest injustice is liable to be done."

In the light of this decision it can not be assumed that the courts of Maine would give to a citizen of that State against whom a divorce had been obtained in a foreign jurisdiction upon a constructive service—a less degree of relief than they afford as to a decree rendered in Maine, both parties being present and bound by the decree.

Rhode Island: Ditson *v.* Ditson (1856),[20] was a suit for divorce on the grounds of desertion, extreme cruelty and non-support, brought by a wife domiciled in Rhode Island, against the husband who had never resided in Rhode Island, and whose whereabouts was unknown. The question was whether the Rhode Island court ought to exercise jurisdiction. The opinion was mainly devoted to refuting the reasoning employed by Chief Justice Shaw in his opinion in the case of Lyon *v.* Lyon,[21] in which case, as previously shown, the Massachusetts court refused to give effect to a Rhode Island decree of divorce where both parties were not within the jurisdiction. The Rhode Island court (in the Ditson case) in effect declared that it would not exercise jurisdiction to grant a divorce if it considered that a decree rendered by it would not be entitled to extra-territorial effect because of a lack of actual jurisdiction over the defendant. The court, however, proceeded to reason that a suit for divorce was in effect a proceeding *in rem,* and that jurisdiction over one of the parties to a suit for the dissolution of the marriage tie drew to the court jurisdiction of the other party, and thereby gave full and complete jurisdiction over the status of both parties and upon that hypothesis decided that it would exercise jurisdiction, and that its decree dissolving the marriage would be entitled to the benefit of the full faith and credit clause of the Constitution and have binding efficacy in every other state.

New Jersey: Whilst the courts of New Jersey have exercised the power to grant a divorce from a nonresident defendant, upon constructive service, those courts have from the beginning applied to similar decrees of divorce granted in other states,

20. 4 R. I. 87.

21. 2 Gray, 367; Doughty *v.* Doughty, 28 N. J. Eq. 586; Flower *v.* Flower, 42 N. J. Eq. 152, 7 Atl. Rep. 669.

when sought to be enforced in New Jersey against citizens of that State, a rule like the one prevailing in New York, that is, they declined to enforce them even upon the principles of comity.

Recently, however, it has been decided,[22] that where a decree of divorce was rendered in another state, and the complainant alone was subject to the jurisdiction of the court, but it was shown that the defendant had been personally served outside of the jurisdiction with notice of the pendency of the divorce proceeding and was afforded reasonable opportunity to make defense and did not avail of the opportunity, effect would be given to such decree in New Jersey upon principles of comity, provided that the ground upon which the decree rested was one which the public policy of New Jersey recognized as sufficient cause for divorce. In Wallace *v.* Wallace,[23] the subject is quite fully reviewed.

Ohio: In Cooper *v.* Cooper (1836),[24] without citation of authority a divorce granted in Indiana from a resident in Ohio upon constructive service, was held to bar an application for divorce and alimony in Ohio. In Mansfield *v.* McIntire (1840),[25] despite a divorce obtained in Kentucky by a husband upon constructive service, the divorced wife was regarded in Ohio as the widow of her former husband after his decease, and as such widow entitled to dower. In Cox *v.* Cox,[26] decided at the December term, 1869, the facts were these: The husband deserted the wife in Ohio, went to Indiana and there obtained a divorce upon constructive service. The wife remained in Ohio and three years after the granting of the Indiana divorce to the husband she sued him for divorce and for alimony, alleging abandonment and gross neglect of duty. The trial court granted a dworce and alimony. The husband appealed, but as such appeal, under the statute of Ohio, did not affect the decree as to the divorce, the district court considered only the question of alimony and rendered a new decree for alimony

22. Felt *v.* Felt, 59 N. J. Eq. 606, 45 Atl. Rep. 105, 49 Atl. Rep. 107.
23. 62 N. J. Eq. 509, 50 Atl. Rep. 788.
24. 7 Ohio (pt. 11), 238.
25. 10 Ohio, 27.
26. 19 Ohio St. 502.

against the defendant. The case was then taken to the Supreme Court of the State. In that court attention was called to the fact that under the statutes of Ohio and the decisions of its courts jurisdiction might be exercised over nonresidents in divorce cases, and reference was made to various authorities tending to show that public policy required the recognition of the validity of such decrees in other states as to the dissolution of the marriage. After stating the facts, and observing that the wife was entitled under the laws of Ohio to either divorce or alimony or both, at her election, and alluding to the Indiana decree, the court said:

"The question therefore is whether the *ex parte* decree can be made available not merely to effect a dissolution of the marriage but to defeat the right of the petitioner to the alimony which the statute upon the facts as they exist in regard to the husband's desertion, intended to provide for her. We think the decree ought not to have such effect. In arriving at this conclusion we make no distinction between a decree rendered under the circumstances in this case in a foreign, and one rendered in a domestic forum. In either case, to give a decree thus obtained the effect claimed for it, would be to allow it to work a fraud upon the pecuniary rights of the wife. Such a result, in our opinion, is rendered necessary by no principle of comity or public policy—the only grounds upon which *ex parte* decrees of divorce are authorized and supported. It is not essential to the allowance of alimony that the marriage relation should exist up to the time it is allowed. On appeal, alimony may be decreed by the district court, notwithstanding the subsisting divorce pronounced by the court of common pleas. It is true that the statute speaks of the allowance as being made to the wife. But the term 'wife' may be regarded as used to designate the person and not the actual existing relation; or the petitioner may still be regarded as holding the relation of wife for the purpose of enforcing her claim to alimony."

In Doerr *v.* Forsythe (1893),[27] an Indiana divorce granted to a husband, upon constructive service, was held not to bar the right of the wife to dower in land in Ohio owned during coverture by the husband.

Alabama: In Thompson *v.* State,[28] the facts were these:

27. 50 Ohio St. 726; 35 N. E. 1055.
28. 28 Ala. 12.

Thompson deserted his family in Mississippi, went to Arkansas and there obtained a divorce upon constructive service. The wife returned to her father's home in Alabama, and after the divorce the husband also went to Alabama, where he again married. He was prosecuted for and convicted of bigamy. The conviction was set aside, however, upon the ground that the guilt or innocence of the accused depended upon the question as to whether he had a *bona fide* domicile in Arkansas during the pendency of the proceeding for divorce. Harding *v.* Alden,[29] was cited as authority.

Indiana: In Tolen *v.* Tolen (1831),[30] the facts were these: A wife, on being deserted in Kentucky, removed to and became domiciled in Indiana, and after a residence there of five years sued for a divorce from the nonresident husband. In an opinion of great length the court considered the question of its power to grant a divorce which would be *valid in Indiana,* and decided it had such power, but expressly reserved passing on the question whether the decree would have extra-territorial force. In Hood *v.* States (1877),[31] it was declared that an *ex parte* divorce in favor of one domiciled in the jurisdiction of the State, and against the nonresident, although founded upon constructive service, was valid as to plaintiff and "public policy" demands that it should be held valid as to both parties.

Missouri: In Gould *v.* Crow,[32] a decree of divorce regularly obtained by a husband in Indiana on an order of publication, without personal service, was held to operate as a divorce in favor of the husband in Missouri, so as to prevent the wife from claiming her dower in lands in Missouri owned by the husband. Harding *v.* Alden,[33] was relied upon for authority. A statute of Missouri, barring the claim of a wife for dower after divorce granted by reason of her fault, was held to apply to all divorces, whether obtained in Missouri or in other states, and whether obtained on personal service or by order of publi-

29. 9 M. E. 140.
30. Black (Ind.), 407.
31. 56 Ind. 363, 271.
32. 57 Mo. 200.
33. 9 M. E. 140.

cation. The doctrine of Gould *v.* Crow was reaffirmed and applied in Anthony *v.* Rice.[34]

Wisconsin: In Shafer *v.* Bushnell (1869),[35] an *ex parte* divorce granted the wife in Minnesota upon constructive service of the defendant, a citizen of Minnesota, was held upon the ground of comity to be conclusive in Wisconsin with respect to the status or domestic and social condition of the wife. In Cook *v.* Cook (1882),[36] however, in an elaborate opinion, an *ex parte* divorce obtained in Michigan, upon constructive service merely, by a husband who had deserted his wife in Wisconsin, was held not to affect the status of the wife in Wisconsin nor to bar her from suing in Wisconsin for divorce, alimony, allowance, and a division of the property of such husband situated in Wisconsin.

Kentucky: The rule in Kentucky is settled in Rhyms *v.* Rhyms,[37] in which a wife proceeded against her husband as a nonresident by a warning order, and it was held that the court had jurisdiction to grant her a divorce, Chief Justice Robertson remarking: "It would be a reproach to our legislation if a faithless husband in Kentucky could by leaving the State deprive his abandoned wife of the power to obtain a divorce at home." In Hawkins *v.* Ragsdale,[38] it was held that a divorce obtained by the husband in Indiana by constructive service determined the status of the party in Kentucky, and that under the statutes of that State it barred all claims to curtesy or dower in Kentucky lands. To the same effect is Perzel *v.* Perzel.[39]

California: The law of California is settled in Re Newman,[40] to the effect that a suit for divorce, as far as it affects the status of the parties and the custody of their children, is a proceeding *in rem,* and service by publication on a nonresident defendant

34. 110 Mo. 223, 19 S. W. Rep. 423.
35. 24 Wis. 372.
36. 56 Wis. 195, 14 N. W. Rep. 443.
37. 7 Bush (Ky.), 316.
38. 80 Ky. 353.
39. 91 Ky. 634, 15 S. W. Rep. 658.
40. 75 Cal. 213, 16 Pac. Rep. 887.

is good. This ruling was repeated in Re James,[41] where it is declared that such decree is equally valid in other states.

Tennessee: Nowhere is the rule more strongly asserted than in Tennessee, where a decree obtained in Illinois by publication was sustained in Thomas *v.* King,[42] and where it seems to have been held that the decree could not be impeached even by showing the absence of necessary residence.

Kansas: The law in Kansas is settled in Rodgers *v.* Rodgers,[43] to the effect the courts of the sister states may dissolve a marriage relation between a husband domiciled there and a wife domiciled in Kansas, by publication, although unknown to her; but that such courts have no power to settle the title of lands in Kansas or control the custody of the children residing there. But it was also decided in Chapman *v.* Chapman,[44] that a wife having obtained a divorce in Ohio upon service by publication, was not entitled to dower to lands in Kansas, fraudulently conveyed by her husband, in fraud of her or others.

Louisiana: In Smith *v.* Smith,[45] it is held that a wife may acquire a separate domicile from that of her husband where his conduct has been such as to furnish ground for divorce, and her marriage status becomes subject to the jurisdiction of that domicile, and that the courts thereof may grant a divorce upon actual or constructive notice. The right of the Louisiana courts to decree a divorce against the absentee by means of substituted service is again affirmed in Butler *v.* Washington.[46]

Iowa: In Kline *v.* Kline,[47] a decree rendered in another state on service by publication was recognized; except so far as it attempted to fix the custody of the minor children.

Maryland: In Garner *v.* Garner,[48] the power to grant a divorce against a nonresident, upon whom process has not been served, was recognized, but the right to a decree that the nonresident should not marry again was denied.

41. 99 Cal. 374, 33 Pac. Rep. 1122.
42. 95 Tenn. 60, 31 S. W. Rep. 983.
43. 56 Kan. 483, 43 Pac. Rep. 779.
44. 48 Kan. 636, 29 Pac. Rep. 1071.
45. 43 La. Ann. 1140, 10 So. Rep. 248.
46. 45 La. Ann. 279, 12 So. Rep. 356.
47. 57 Iowa, 386, 10 N. W. Rep. 825.
48. 56 Md. 127.

Minnesota: In Thurston *v.* Thurston,[49] the divorce was recognized, though process was served outside of the State. But it was held that the question of alimony was not *res adjudicata* by reason of the judgment. The wife was allowed alimony out of the property in Minnesota.

Illinois: The validity of a foreign divorce obtained without personal service is recognized in Illinois in Knowlton *v.* Knowlton,[50] and in Dunham *v.* Dunham.[51]

The law in this country, then, may be summarized as follows: In Maine, Massachusetts, Rhode Island, Kentucky, California, Tennessee, Ohio, Missouri, Kansas, Louisiana, Wisconsin, Alabama, Iowa, Indiana, Maryland, Minnesota, Illinois and New Jersey, the validity of a divorce obtained, in another state, by a party there domiciled, in a proceeding where constructive service upon the defendant only is obtained, is fully recognized. In Ohio, Iowa and Minnesota, and perhaps also Louisiana and Alabama, her right to alimony and dower is preserved.

But the very cases which limit the effect of the divorce, so far as property rights are concerned, restrict such right to dower in lands of which the husband was seized during coverture, and inferentially, at least, to alimony from such property. It is also limited to property within the state where suit is brought. That her right in her husband's property should extend to property acquired by him long after the divorce is nowhere indicated.

The only states in which it is held that a party domiciled in another state may not obtain a divorce there by constructive service are New York, Pennsylvania, North and South Carolina.

The confusion of our divorce laws is forcibly illustrated in the case of Haddock *v.* Haddock,[52] decided by the Federal Supreme court in April, 1906. The Haddocks were married in 1868, in New York, where both parties then resided. The very day of the ceremony and before the marriage was consummated, they separated and never lived together. The wife continued the reside at her former home; the husband, after some years

49. 58 Minn. 279, 59 N. W. Rep. 1017.
50. 155 Ill. 158, 39 N. E. Rep. 595.
51. 162 Ill. 589, 44 N. E. Rep. 841.
52. 210 U. S., p. 562.

of wandering, established a domicile in Connecticut, and, in 1881, obtained in a Connecticut court a decree of absolute divorce from his wife. In this suit constructive service on the wife was obtained in accordance with the local statute. In 1891, Mr. Haddock inherited a considerable quantity of property, and three years afterwards, twenty-six years after the marriage and thirteen years after the Connecticut divorce, the woman brought suit against him in New York for a divorce from bed and board and for alimony. The defendant was served constructively, and a decree for fifteen hundred dollars annual alimony was rendered. As there was no personal service the decree, so far as alimony was concerned, was, of course, ineffectual. But in 1899 the woman obtained personal service on Haddock in a new proceeding and a valid decree for alimony in the sum of seven hundred and eighty dollars a year was entered. In the meantime Haddock, acting on the Connecticut divorce, had married again, and the effect of the New York decree was to declare his second wife an adulteress and to bastardize any issue of the second marriage. Haddock appealed to the United States Supreme Court, on the ground that the decrees denied full faith and credit to the Connecticut divorce. The Supreme Court upheld the action of the New York court and affirmed its judgment. This decision was reached by a bare majority of the nine judges, Mr. Justice White writing the opinion of the court for himself, the Chief Justice and Justices Peckham, McKenna and Day, Brown and Holmes, JJ., filed dissenting opinions in which Harlan and Brewer, JJ., concurred. The point involved, broadly stated, is the extra-territorial validity of a decree of divorce pronounced after constructive service on the defendant. This extra-territoriality depends upon assimilating divorce decrees to judgments *in rem,* and judgments *in rem* are ordinarily said to include all judgments other than those *in personam.* The courts which view divorce judgments as *in rem* find the *res* in the marriage status of the parties, and make the jurisdiction over this status depend on the *bona fide* domicile of one party. The will to adopt this view, if a paraphrase of Professor James' expression is permitted, comes from a consideration of the intolerable consequences of any other construction—husbands

without wives, wives without husbands, sexual relations legitimate or illegitimate according as they take place on one side or the other of imaginary geographical lines, persons, bastard or legitimate according as they are within or without a particular jurisdiction. Those courts which deny extra-territorial validity to divorce decrees and assimilate them to judgments *in personam,* see a sufficient motive for their course in a growing tendency toward laxness in the marriage tie, and increasing frequency of divorce, and a consequent weakening of the very foundation of society. In support of each view the right of the state to determine the status of its own citizen is appealed to; one side declaring that the principle renders necessary giving jurisdiction to the state wherein the plaintiff has a *bona fide* domicile without regard to the defendant's residence; the other arguing that to concede jurisdiction in such case absolutely deprives the defendant's state of jurisdiction over the status of its own citizen. The Federal Supreme Court had not committed itself to either of these views until the decision in 1901 of Atherton *v.* Atherton.[53] This case presented the validity of a divorce obtained in Kentucky by a husband who was residing there against the wife domiciled in New York. Kentucky was the matrimonial domicile and the husband bringing suit there, obtained a decree of absolute divorce upon constructive service on the wife in accordance with the laws of Kentucky. Upon a subsequent suit by the wife in New York for a limited divorce and alimony the United States Supreme Court, reversing the Court of Appeals of New York, held the Kentucky decree binding and within the full faith and credit of the Federal Constitution. The Federal court was careful to limit its decision to the actual facts presented—the possession of jurisdiction by the State of matrimonial domicile and to disclaim prejudging the status of the decree of a state where one of the parties only ever had a domicile. But no disclaimer could do away with the fact that a divorce decree was treated as belonging to the class of judgments *in rem,* in that a judgment rendered against a person domiciled elsewhere upon constructive service only was held to satisfy the requirement of due process of law, and to

53. 181 U. S. 155.

be within the full faith and credit clause of the United States Constitution. Atherton *v.* Atherton is surely as much open as the Connecticut decision in Haddock *v.* Haddock to the charge of depriving the defendant's own state of the right to determine the defendant's matrimonial status. And, after all, granting the truth of this charge, it seems nothing to freeze the blood or make each particular hair to stand on end. A race of diligence between two parties to give jurisdiction to one court or another is an idea familiar enough.[54]

In Pennoyer *v.* Neff,[55] the court, speaking in a masterly opinion by Judge Field, declared that, since the Fourteenth Amendment had given to the Federal Supreme Court authority to determine the presence of due process of law in all cases, even in domestic judgments, a judgment void when brought in question beyond the limits of the state for want of due process was void also within a state for the same reason. Haddock *v.* Haddock, if this doctrine is to stand, means that the Connecticut decree is void even in Connecticut and the wife declared an adulteress everywhere. Or, if we discard this doctrine, we are brought back to the idea of decrees of divorce valid within a limited territory, invalid elsewhere. M, for instance, has been divorced on constructive service in New York from N, who resides in Pennsylvania, and has contracted a new marriage with O, in New York. In New York O is his wife, but once across the state line and he becomes the husband of N. In New York O's children are legitimate, but they become bastards as soon as they go out of that state, and in Pennsylvania M may still have children by N who are legitimate everywhere except in New York, but who are bastards there. The wildest nightmare never produced conditions more chaotic than all this. Is it possible that there is some third alternative? May we imagine a decree that operates upon and binds the plaintiff, as due process of law, while invalid as to the defendant? In Atherton *v.* Atherton, Mr. Justice Gray pronounced the idea of a husband without a wife or a wife without a husband to be "unthinkable." But under the opinion

54. Law Notes, vol. 10, No. 3.
55. 95 U. S. 714.

in Haddock *v.* Haddock, we may have to entertain ideas beyond the range of Mr. Justice Gray's capacity. The Atherton case is recognized as authoritative in Haddock's case, and we are therefore in the position of treating divorce decrees as in effect *judgments in rem,* when the circumstances fall exactly within the facts of Atherton's case, whereas under other circumstances we ought to treat them as in *per personam.* By settled decisions of the court a wife may, under certain circumstances, acquire a real *bona fide* domicile in the state where her husband has never been, but it appears that many of her dearest personal rights still adhere in the matrimonial domicile, a palpable fiction is admitted so as to give validity to the decree of divorce of the matrimonial domicile, while the actual domicile, which she has been forced to adopt through her husband's misconduct, is not recognized. And while the fiction of the wife's presence is operative at the matrimonial domicile, it is without effect, in favor of a domicile which the husband may afterwards acquire, else the Haddock Connecticut divorce would have been valid. When husband and wife each acquire a separate domicile different from the matrimonial domicile, then there is no possibility of a divorce without personal service—or perhaps the jurisdiction may still cling round the fragments of the shattered matrimonial domicile. We have been told on the highest authority within a few years that the law was not a logical science, and should not be deterred by considerations of logic from stopping short of a given conclusion. One may feel with Mr. Justice Brown that Haddock *v.* Haddock "seems to be a step backward in American jurisprudence," and yet assent to Judge Holmes' somewhat cynical remark: "I do not suppose that civilization will come to an end whichever way this case is decided." Civilization will not come to an end, nor, we may predict, will the decisions of the United States Supreme Court on this interesting and important topic, until some consistent and comprehensible principles are laid down for its government. An interesting attempt to reconcile these cases is made in the September, 1907, number of Bench and Bar, by Mr. Raymond D. Thurber of the New York bar. Mr. Thurber's article is of considerable length and closely reasoned. I give, however, a passage which suggests the method of reconciling the Atherton

case with the Haddock case: "If the jurisdiction of the Kentucky court depended on the actual fact of Mrs. Atherton's domicile in Kentucky, to reconcile the two decisions would be a logical impossibility. But that is not the case. On the contrary, the rule is that when a court has some evidence of the existence of a jurisdictional fact, its finding that the fact exists will confer jurisdiction to render a decree which will be exempt from collateral attack. Such evidence, it is believed, as to the defendant's domicile in Kentucky is to be found in those circumstances in the Atherton case which were held to establish the jurisdiction. The parties were living there as husband and wife; and up to the time of the separation the marital status—the entire *res*—was beyond question safely housed within the state. The wife as well as the husband were both actually and constructively domiciled there; and, under a familiar rule, this status is presumed to have continued until proven to have been altered. Again, the defendant, being the wife, was subject to the presumption that her domicile was that of her husband—a presumption which could be overcome only by showing not only that she had left him, but that she had a right to leave him. Hence, by merely proving this situation, the plaintiff made out a *prima facie* case for full jurisdiction; and this would seem to put the decree beyond the reach of collateral attack." The Kentucky court "having before it a sufficient *prima facie* case of jurisdiction," it was not bound to make any preliminary inquiry, but could safely proceed without regard to a possibility that a more thorough examination, upon evidence not before it, might require it to dismiss the case. All of which tends to establish the soundness of the proposition which we started out to examine, viz., that the state of the matrimonial domicile, if the plaintiff was deserted there and still resides there, has *prima facie* jurisdiction over the marital status of the errant defendant—at least if the defendant be the wife. This is believed by Mr. Thurber the only logical explanation of the consistency of the Atherton and Haddock cases.

Viewing the attempt of the learned Mr. Thurber to reconcile the celebrated cases of Atherton *v.* Atherton and Haddock *v.* Haddock, along with the decisions of the United States Supreme

Court and the dissenting opinions of Justices Brown and Holmes, which were concurred in by Justices Harlan and Brewer, in the latter case, it would require a faculty for judicial analysis to reconcile the discussions on this important topic, that could

Sever and divide,
A hair twixt the north,
And northeast side.

HENRY BERGER,
in 45 American Law Review, p. 554.